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No. 503

IN THE

SUPREME COURT OF THE UNITED STATES

ARLAN'S DEPARTMENT STORE
OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY -- - Appellants

versus

COMMONWEALTH OF KENTUCKY - - Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1962

No._____

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY — *Appellants*

v.

COMMONWEALTH OF KENTUCKY — *Appellee*

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellants here jointly appeal from a decree (styled "mandate" under Kentucky practice) of the Court of Appeals of Kentucky, which is the Court of last resort of the Commonwealth of Kentucky, which decree was entered on February 23, 1962 (Petition for Rehearing overruled June 22, 1962). The judgment appealed from sustained the Constitutional validity of Kentucky Revised Statute 436.160 which Statute contains Kentucky's version of the Sunday Closing Laws or Sunday Blue Laws. This jurisdictional statement is submitted by Appellants to show that the Supreme Court has juri-

isdiction of the appeal and that a substantial question is presented. The combined cases here presented involve identical questions and this Jurisdictional Statement is filed jointly pursuant to Supreme Court Rule 15:3.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky, in support of its decree aforesaid, is reported in Ky., 357 S.W.2d 708. Said opinion as well as said decree (mandate) is set out in full in Appendix "A" hereto.

Also set out in Appendix "A" hereto is the unreported opinion of the Honorable L. R. Curtis, Circuit Judge, Jefferson (Kentucky) Circuit Court.

JURISDICTION

These cases arose as a result of separate criminal misdemeanor warrants against Appellants for violation of the Kentucky Sunday Closing Law (K.R.S. 436.160).

The decree of the Court of Appeals of Kentucky here sought to be reviewed was entered on February 23, 1962, to which decree a Petition for Rehearing was duly filed, which Petition under the Rules of the Court of Appeals of Kentucky stayed said decree until its determination. The Petition for Rehearing was overruled on June 22, 1962. Notice of appeal to the Supreme Court of the United States was filed with the Clerk of the Court of Appeals of Kentucky on June 29, 1962, in conformity with the procedure pre-

scribed by Rule 10(3) of the Rules of the Supreme Court of the United States.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257 (2). The cases believed to sustain this Court's jurisdiction are: Martin v. Hunter's Lessee, 14 U.S. 304, 1 Wheat. 304, 4 L.Ed. 97; Cohens v. Virginia, 19 U.S. 264, 6 Wheat. 264, 5 L.Ed. 257; McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101.

THE STATUTE INVOLVED

The Statute here involved is Kentucky Revised Statute 436.160, which may be found in Vol. III, Title XL, Chapter 436 (Entitled "Offenses Against Morality"), Page 57 (of said title) in the official Edition of said Statutes. K.R.S. 436.160 reads as follows:

> "(1) Any person who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed a separate offense.
>
> "(2) Persons who are members of a religious society which observes as a Sabbath any other day

in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.

"(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera.

"(4) Any person who holds any boxing or wrestling match or exhibition on Sunday shall be fined not less than ten dollars nor more than one hundred dollars.

"(5) Any person licensed to keep, or any person controlling, a billiard, pigeon-hole or pool table who permits any game to be played on it on Sunday shall be fined not less than twenty-five dollars nor more than sixty dollars, and forfeit his billiard, pigeon-hole or pool table license if he holds such a license.

"(6) Any person who hunts game, with a gun or dogs, on Sunday shall be fined not less than five dollars nor more than fifty dollars."

It is to be noted that only Sections 1, 2 and 3 of the Statute aforesaid were involved in the preceding litigation.

QUESTIONS PRESENTED

1. Whether the terms of the Kentucky Closing Law (K.R.S. 436.160) discloses an intent to aid religion contrary to the proscription of the Establishment Clause of the First Amendment, rather than an

intention by the State "to set one day apart from all others as a day of rest, repose, recreation and tranquility."[1]

2. Whether said Kentucky law, by the general exemption provided in Section (2) thereof to "persons who are members of a religious society which observes as a Sabbath any other day of the week than Sunday . . . if they observe as a Sabbath one day in each seven" does not thereby fall within the interdiction of the Establishment Clause aforesaid by

(a) Negating the interpretation that the basis for said law is the secular establishment of a day of rest and recreation for the common good;

(b) Demonstrating that the law in question is one intended to "aid all religions"[2] (to the detriment of the Constitutional guarantees of persons observing no Sabbath, or observing a Sabbath other than Sunday without membership in a "religious society" which observes such a Sabbath).

3. Whether said law by the exemption aforesaid denies equal protection of the law as guaranteed by the Fourteenth Amendment to persons observing no Sabbath, and to non-Sunday Sabbatarians unaffiliated with a "religious society."

4. Whether said law by the exemption aforesaid denies equal protection of law as guaranteed by the

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[1] McGowan v. Maryland, 366 U.S. 420, 450, 6 L.Ed.2d 393, 412.

[2] Everson v. Board of Education, 330 U.S. 1, 15, 16, 91 L.Ed. 711, 723, 67 S.Ct. 504.

Fourteenth Amendment to business entities such as the Appellafits here, which are corporations and can have no religion or Sabbath, by granting to individuals who are members of religious societies observing some day other than Sunday as a Sabbath a choice between not employing others on Sunday or on the day observed by their religion as a Sabbath.

STATEMENT OF THE CASE

This case arose as a result of criminal warrants taken against the Appellants in Jefferson County Quarterly Court, Jefferson County, Kentucky. Said warrants charged each Appellant with violation of K.R.S. 436.160 in that said Appellants employed persons in their business on Sunday. Each Appellant moved to dismiss the charge against it on grounds that the Statute in question was violative of certain sections of the State Constitution and of Amendments 1 and 14 of the Federal Constitution and therefore void. This Motion was overruled and, each Appellant having admitted that he had no defense, other than the constitutional objections aforesaid, they were each convicted and fined the sum of $20.00 and . Said Motion and the Quarterly Court's ruling thereon is referred to in the opinion of the Jefferson Circuit Court (Appendix "A").

Appeal from the judgment of the Quarterly Court aforesaid was taken to the Jefferson Circuit Court, Jefferson County, Kentucky. (Pages 5 through 8 and Pages 19 through 22 of the Transcript of Record herein).

Each Appellant, in Circuit Court, renewed its Motion to Dismiss on grounds that the Statute under which they stood charged was violative of both the Kentucky Constitution and of Amendments 1 and 14 of the Federal Constitution and was, therefore, void. (Record pages 9 and 23). Appellants' position in Circuit Court again was that the only defense available to them was the constitutional invalidity alleged by their Motions.

The Jefferson Circuit Court sustained the Motions as to each of the Appellants and rendered judgment dismissing the prosecution. (Record Page 10). Filed with the Order dismissing aforesaid was a written Opinion by the Court which appears in the Record, Page 11 through 17, and is reproduced in Appendix "A" hereto.

The judgment of the Circuit Court aforesaid was appealed by the Commonwealth of Kentucky to the Court of Appeals of Kentucky. (Record Pages 1 through 3).

The sole issues on appeal were the constitutional validity of the Statute in question under certain sections of the Kentucky Constitution and under the Federal Constitution, Amendments 1 and 14. The issues were briefed by the Attorney General of Kentucky for the Commonwealth, by Amicus Curiae, and by Appellants. The Briefs are not reproduced as a part of the Record.

The decree (mandate) of the Court of Appeals of Kentucky reversing the Circuit Court with directions

to reinstate the prosecutions was entered on February 23, 1962. (Record Page 42, reproduced as a part of Appendix "A" hereto). Said mandate was accompanied by an Opinion of the Court of Appeals (Record Pages 43 through 48; reproduced in full in Appendix "A" hereto). It is evident from the Opinion that the validity of the Kentucky Statute was drawn in question on Federal constitutional grounds and that the decision of the Court of Appeals was in favor of its validity.

On April 9, 1962, pursuant to Rule 1.340 of the Rules of the Court of Appeals of Kentucky a Petition for Rehearing was filed (Record Page 48) a printed copy of said Petition for Rehearing is included in the Record and is affixed to Page 49 of said Record. Under the Rule of the Court of Appeals aforesaid the filing of the Petition for Rehearing stayed the issuance of the Court's decree (mandate) until such Petition for Rehearing was ruled on. On June 22, 1962, the Petition for Rehearing was overruled by the Kentucky Court of Appeals (Record Page 51).

Notice of appeal to the Supreme Court of the United States was filed with the Clerk of the Court of Appeals of Kentucky on June 29, 1962, in conformity with the procedure prescribed by Rule 10 (3) of the Rules of the Supreme Court of the United States. (Record Pages 55 through 58).

By Order entered August 23, 1962, the time for docketing the case in the Supreme Court of the United States was enlarged to and including October 15, 1962.

by Judge Morris C. Montgomery of the Court of Appeals of Kentucky (See Supplemental Transcript of Record). Said enlargement of time was in conformity with the provisions of Rule 13 (1) of the Rules of the Supreme Court of the United States.

THE QUESTIONS ARE SUBSTANTIAL

The nature of this case and the opinions of the courts below are such as to bring the case within the jurisdictional provision relied upon and the cases cited to sustain the jurisdiction. It is clear from the statement of the case herein and opinions of the courts below that there has been a final judgment of the highest court of Kentucky in which a decision could be had whereby there was drawn in question the validity of a Statute on the ground of its being repugnant to the Constitution of the United States and that the decision was in favor of its validity.

Although a substantial number of constitutional questions regarding the validity of Sunday Closing laws under Amendments 1 and 14 of the Constitution were recently decided by this Court in McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101; Gallagher v. Crown Kosher Super-market, 366 U.S. 617, 6 L.Ed.2d 536, 81 S.Ct. 1122; Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 6 L.Ed.2d 551, 81 S.Ct. 1135, the questions here presented were neither determined nor foreclosed in the Opinions aforesaid. (See concluding paragraph in

the majority Opinion in McGowan v. Maryland, supra). The Kentucky Statute here brought into question in extent and content bears little operational resemblance to the bodies of Sunday laws presented in the decided cases. In the decided cases it is apparent that the laws of the States of Maryland, Massachusetts and Pennsylvania there under consideration, embody not a prohibition of Sunday works with few exemptions but rather in each case consist of a basic prohibition against Sunday work upon which has been engrafted what might be characterized a plethora of exceptions, many of recent legislative enactment, and all of which directly or indirectly form a consistent pattern from which can be inferred a legislative intent to set one day apart as a day of rest, repose, recreation and tranquility.

In the Kentucky Statute we find no such broad pattern of exemption or exception and under its provisions an overwhelming number of the recreational activities normally associated with leisure in the United States would be effectively forbidden. In the Kentucky Statute beyond the Biblically rooted exceptions for household duties and works of necessity or charity and the non-Sunday Sabbatarian exemption which will be discussed in more detail hereafter, only two exemptions of a business nature (maintenance or operation of a public service or public utility plant or system and operation of filling stations) and five specific exemptions of a recreational nature (amateur sports, athletic games, chautauquas, and opera) are

to be found. Certainly these exceptions are not sufficient to afford the people of Kentucky any normal range of recreational pursuits on Sunday.

The general exemption provided in Section 2 of the Kentucky Statute in question of "persons who are members of a religious society which observes as a Sabbath any other day of the week than Sunday" who do in fact observe such a Sabbath, can only further contradict any legislative intent to provide a common one day in seven work surcease. Clearly such a provision can only be intended to legislatively encourage for each religion that its members perform keep holy their respective Sabbaths.

It is to be noted that in none of the decided cases was such a Sabbatarian exemption provided. In Braunfeld v. Brown, 366 U.S. 599, 6 L.Ed.2d 563, 81 S.Ct. 1144, it was determined that a member of a religious society which observes as a Sabbath a day other than Sunday is not prejudiced under the guarantees of the First or Fourteenth Amendments by a failure of his state legislature to provide such an exemption for him. This decision, of course, is in no way determinative of the effect of the inclusion of an exemption such as is presented in Section 2 of the Kentucky Statute. The Kentucky exemption can only be interpreted as an aid to all religions, or at least an aid to all organized religions. As such it would seem to fall inevitably within the proscription of the Establishment Clause of the First Amendment.

By its limitation of exemption to members of a religious society this section would seem to clearly deny equal protection of the law guaranteed by the Fourteenth Amendment to persons who are unaffiliated with any religious society or unable to qualify for such affiliation.

It is submitted that the questions here in issue are substantial. A number of states, besides Kentucky have in their law Sabbatarian exemptions similar or identical to Section 2 of the Kentucky Statute. Other states may well, in the future, contemplate the adoption of such exemptions. Appellants submit that clarification of the questions raised herein are amply justified.

It is submitted that the Kentucky Court of Appeals erred in its evaluation of the criteria to be applied in determining whether or not the Kentucky Sunday Closing Law is a valid exercise of legislative police power sustainable as a welfare measure. It is further submitted that the Kentucky Statute in question does not comport with the criteria for validity prescribed in the cases previously decided by this Court. Appellants further believe that the Kentucky Court of Appeals misinterpreted the effect of the exemption contained in Section 2 of the Kentucky Statute in question and that a proper evaluation of the effect of this exemption must render the Statute in question void under the First and Fourteenth Amendments to

the Constitution of the United States. Appellants believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Mandate of Court of Appeals

COURT OF APPEALS OF KENTUCKY

Winter Term, February 23, 1962

Commonwealth of Kentucky - - Appellant

vs:

Arlan's Department Store of Louisville, et al., - - - - - - - - Appellees

Appeal from a Judgment of the Jefferson Circuit Court, Criminal Branch—Second Division

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ORDER

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed with directions to reinstate the prosecutions; which is ordered to be certified to said Court.

It is further considered that the appellant recover of the appellees, its costs herein expended.

OPINION

Commonwealth of Kentucky, Appellant
v.
Arlan's Department Store of Louisville, et al.,
Appellees.

Court of Appeals of Kentucky.
Feb. 23, 1962.

Rehearing Denied June 22, 1962.

CULLEN, Commissioner.

On warrants charging violations of the Kentucky "Sunday Closing Law," KRS 436.160, the owners of three retail stores in Louisville were tried in the quarterly court, found guilty, and fined $20 each. They appealed to the circuit court, which dismissed the prosecutions on the ground that the statute is unconstitutional. The Commonwealth has appealed from the judgments of dismissal.

The circuit court held the statute unconstitutional on the grounds that it violated state and federal constitutional guaranties of freedom of religion and prohibitions against establishment of religion or giving preference by law to any religious sect (Ky.Const., Secs. 1, 5; U.S.Const., Amendments 1, 14); that it was not a proper exercise of the police power; and that the exemptions were such as to make the statute discriminatory and arbitrary.

In substance, the Kentucky statute prohibits working on Sunday or employing another person to work on Sunday at any occupation or in any labor or business except:

1. Ordinary household duties.
2. Work of necessity or charity.
3. Maintenance or operation of a public service or public utility plant or system.
4. Amateur sports.
5. Athletic games.
6. Moving picture shows.
7. Chautauquas.
8. Filling stations.
9. Opera.

A further exception is of persons who are members of a religious society which observes as a Sabbath a day in the week other than Sunday and who actually do observe as a Sabbath one day in each seven. The statute prescribes special penalties for holding a boxing or wrestling match, or permitting billiards or pool to be played, or hunting game with guns or dogs, on Sunday.

Subsequent to the rendering of the decision in the circuit court and while these cases were pending on appeal, the Supreme Court of the United States held valid similar statutes of Maryland, Massachusetts, and Pennsylvania, in McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393; Gallagher v. Crown Kosher Super Market of Massachusetts, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536; Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551; and Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563.

Except as to one point which will hereinafter be discussed, the opinions of the Supreme Court in the above cited cases, to which we shall adhere, completely refute the contentions that our Kentucky statute violates constitutional guaranties and prohibitions with

respect to religion, that the statute is not a proper exercise of the police power, and that the exemptions are such as to make the statute discriminatory or arbitrary or violative of the right to equal protection of the law.

In none of the four cases did the Supreme Court expressly uphold the validity of a blanket exemption, such as is contained in our statute, of persons who observe a Sabbath other than Sunday in accordance with the precepts of a religious society of which they are members. It is contended here that the existence of this exemption creates a discrimination against persons who do observe Sunday as the Sabbath and imparts such a religious flavor to the entire statute as to bring it within the constitutional prohibition against any law for the establishment of religion.

While the Supreme Court did not specifically rule on this question, it is to be noted that the Massachusetts statute, which was upheld in the Gallagher case, contained several limited exemptions in favor of persons who observe a Sabbath other than Sunday, and the Court found no fault in those exemptions. Furthermore, in the Braunfeld case, where the contention was that the Pennsylvania statute was invalid because it did *not* provide an exemption for persons who because of religious conviction observe a Sabbath other than Sunday, the Court referred to the fact that a number of states do provide such an exemption and said, "this may well be the wiser solution to the problem." So it must be considered that the Supreme Court by implication did uphold the validity of such an exemption.

Our own view is that the exemption does not affirmatively prefer any religion nor amount to the

establishment of a religion. Rather, it simply avoids penalizing economically the person who conscientiously observes a Sabbath other than Sunday.

Apart from the questions of constitutionality, the appellees argue that the Kentucky Sunday Closing Statute has been repealed by implication by certain subsequent statutes (KRS 244.290, 244.480) authorizing local governmental units to permit the sale of alcoholic beverages on Sunday; and by another subsequent statute (KRS 337.050) requiring time-and-a-half pay for work done on the seventh day of the week.

With respect of the statutes permitting Sunday sales of alcoholic beverages, the contention is that in enacting such statutes the legislature evinced an intent to abandon the idea of making Sunday a day of divorcement from worldly pursuits; that in permitting alcoholic beverages to be sold on Sunday the legislature was adopting the policy that "anything goes" on Sunday. However, in the McGowan case, in reference to the fact that the Maryland Sunday Closing Law provided various exemptions for sales of alcoholic beverages, the Supreme Court said that the legislature could reasonably find that in conformity with carrying out the general purpose of the statute to enhance the recreational atmosphere of the day, "some people will prefer alcoholic beverages * * * to add to their relaxation." We think that at the most the subsequent statutes of Kentucky permitting sales of alcoholic beverages on Sunday constitute simply additional exemptions from the Sunday Closing Law, which are valid on the same basis as the other exemptions.

As concerns the statute requiring time-and-a-half pay for work on the seventh day of the week, it is

argued that this constitutes a legislative recognition that work on Sunday is lawful. We do not find this argument meritorious, because the legislature very well may have imposed the extra wage requirement in recognition of the fact that a considerable variety of Sunday work is lawful by reason of exemptions from the Sunday Closing Law. There is no such irreconcilable conflict between the two statutes as to create a repeal by implication.

In our opinion the circuit court erred in holding KRS 436.160 unconstitutional and in dismissing the prosecutions.

The judgments are reversed with directions to reinstate the prosecutions.

JEFFERSON CIRCUIT COURT
Criminal Branch
Second Division

Nos. 117 745, 117 765, and 117 767

Commonwealth of Kentucky - - - Plaintiff

v.

Arlan's Department Store
Evans Furniture Company, and
Family Fair, Inc. - - - - Defendants

OPINION

These cases, involving the validity of the so-called Sunday closing law, as set out in § 436.160 of the Kentucky Statutes are before the court on appeal from the Jefferson Quarterly Court, wherein motions to dismiss were overruled. A motion to dismiss a similar case pending in the Louisville Police Court was sustained, from which ruling there has been no certification.

Section 436.160, KRS is as follows:

> (1) Any person who works on Sunday at his own or at any occupation or employs any other person, in labor or other business, whether for

profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed a separate offense.

(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.

(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera.

It is the position of the defendants that the above Sunday closing law is premised on the observance of Sunday as a religious duty, and that it is therefore, unconstitutional, both under the law of the Commonwealth, Article 1, Subsections 1, 3 and 5 of the Kentucky Constitution, and under Amendments I and XIV of the Federal Constitution. Special counsel for the Commonwealth took the opposite view.

The precise question involved herein was decided in *City of Harlan v. Scott* in 1942, 290 Ky. 585, 162 SW (2d) 8, wherein the court, Judge Fulton writing said,

> "... While Sunday prohibitive laws have a religious origin they are held constitutional not on

religious grounds but only upon the theory that the establishment of a compulsory day of rest is a legitimate exercise of the police power."

The law imposes on government an obligation of neutrality not only as between competing sects and faiths but also as between religions and non-religions. The statutory exemption of members of a religious society which observes as a sabbath any day of the week other than Sunday, condemns the constitutionality of said section rather than upholds it. There are many persons who observe neither Sunday nor any other day as the sabbath. The decision in the Scott case, though decided 18 years ago, has never been overruled, distinguished or modified, and stands as the law today.

In view of the above decision, this court is of the opinion that the Kentucky Sunday Closing Law, both in theory and in its actual phraseology, is religiously inspired and motivated and cannot be sustained on religious grounds. This court is furthermore of the opinion that said section cannot be upheld on the theory of general welfare or police power, that is, the health, happiness, well being or morals of the public demand that they have at least one day in the week for rest from their labors.

Times have changed. Conditions are different. In the almost three decades since the sabbath law was before the Court of Appeals, it has been drastically amended. The vast and substantial changes in our social and legal structure makes nugatory the basis upon which the law as it existed prior to 1934 was previously sustained. There have been several cases defining the extent of police power in the regulation of business which leads to the inevitable conclusion

that the sabbath law, on re-examination, must be and is beyond the pale of the police power.

In 1940 in the case of *City of Louisville* v. *Kuhn*, 284 Ky. 684, 145 SW (2d) 851, our Court of Appeals is striking down an ordinance of the City of Louisville which undertook to regulate the hours during which barber shops might operate, in discussing the scope of the police power said,

> " . . . , By whatever direction or phase legislation may take—whether of a regulatory or prohibitory character—it must not exceed or go beyond the limits of reasonability, or be rested upon assumed grounds for which there is no foundation in fact, nor may the legislation as enacted be more destructive of the interest of the public at large than beneficial."

In the Kuhn case the Court of Appeals quoted with approval the opinion in *Tolliver* v. *Blizzard*, 143 Ky. 773. The latter case involved an ordinance which prohibited the sale of soft drinks except lemonade, pop, Coca Cola, etc. The Court of Appeals declared said ordinance was void because a municipality, under the police power, could not prohibit the sale of those drinks which were not harmful to the public or public morals and an attempt to do so was an unlawful interference with the liberty and property of the public. While the facts in the Kuhn and Tolliver cases are not exactly similar to the facts in the instant case, the principle involved is the same.

The decision in the case of *City of Jackson* v. *Murray-Reed Sloan & Co.*, 178 SW (2d) 847, decided in 1944, enunciated the same principle. In that case the Court of Appeals declared invalid an ordinance of the City of Jackson requiring all business to remain

closed between the hours of midnight and 4:00 a.m. Insofar as such ordinance affected a restaurant business operated by appellee, in declaring said ordinance invalid, the court said.

> "... It is apparent that if this ordinance is to be upheld, resort will be had to the police power of the city since Section 4, subsection 5 of our Bill of Rights, guarantees to citizens the right of acquiring and protecting property and Section 2 of that liberty producing instruments says that arbitrary power may not be exercised over the property of freemen. It has been written many times that a municipal corporation through its police power cannot arbitrarily regulate the conduct of business but that such regulation must be reasonable and in no event may a city impose unnecessary restrictions upon lawful or harmless occupations under the guise of protecting the public interest. An ordinance regulating the hours in which such a business may be operated which does not directly or remotely tend to benefit the public health, morals, safety or the general welfare, cannot be justified on the theory that it was passed under the police power."

Incidentally, while this is not germane to the questions involved herein, in retrospect, the court remembers that as a boy he was not allowed to play ball or marbles, or croquet or to engage in or even attend any other game on the sacred sabbath, but whether one approves or disapproves morally of this concept, the fact remains that there is guaranteed to every person by law, the right to believe or not to believe as surely as it guarantees to religionists freedom of belief and worship and it further guarantees to every citizen the

right to engage in any occupation so long as such occupation is not destructive to the morals, safety or well being of the public. It can hardly be contended that the sale of the articles of merchandise on the shelves of defendants, is destructive to the morals, safety or well being of the public.

Furthermore, the court takes judicial knowledge of the fact that at least two of the defendants, Arlans Department Store and the Family Fair, Inc. sell various and sundry articles that may be found and purchased in other stores on the holy sabbath day. The Section under consideration specifically exempts amateur sports, athletic games, picture shows and filling stations and as interpreted allows drugstores and other businesses to sell many of the articles that may be purchased in the stores of said defendants on Sunday. Such exemptions are wholly incompatible with the meaning of police power. To expressly exempt the above mentioned businesses or occupations while holding as contemplated at least two of the defendants, borders on the whimsical, and is so unjust, unfair, discriminatory and arbitrary as to make its application violative of the law.

The motions to dismiss are sustained.

L. R. Curtis
Judge

PROOF OF SERVICE

I, James E. Thornberry, one of the attorneys for Appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 10th day of October, 1962, I served copies of this Jurisdictional Statement on the Commonwealth of Kentucky by mailing a copy hereof, in a duly addressed envelope, with postage prepaid to Honorable John B. Breckinridge, Attorney General, Commonwealth of Kentucky, State Capitol, Frankfort, Kentucky, and on Charles E. Keller, Esq., Attorney for Citizens for Sunday Closing, amicus curiae below, by mailing a copy hereof, with postage prepaid, to the said attorney at his office address, Marion E. Taylor Building, Louisville 2, Kentucky, this 10th day of October, 1962. The giving of notice to the amicus curiae aforesaid shall not be deemed a consent to its participation under Rule 42 of this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC., EVANS FURNITURE COMPANY . . . Appellants

versus

COMMONWEALTH OF KENTUCKY . . . Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF
On Behalf of Appellee

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November 6, 1962

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1962

No. 503

ARLAN'S DEPARTMENT STORE
OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY - - - *Appellants*

vs.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF

Motion to Dismiss

Appellee, Commonwealth of Kentucky, moves the Court to dismiss the appeal upon the ground it does not present a substantial federal question, in that the question has been settled by prior decisions of this Court [Rule 16.1(c)].

The Question. The constitutionality of Kentucky's Sunday Closing Law [KRS 436.160].

Brief in Support of Motion

Where the constitutional question sought to be appealed has previously been ruled upon by this Court, the appeal has been dismissed upon the ground that the constitutional question presented is not substantial in character.

Zucht v. King,
260 U.S. 174, 176; 67 L. Ed. 194, 198; 43 S.Ct. 24 (1922)

See Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929; 44 H.L.R. 1, 12-14 (1930)

Frankfurter & Hart, The Business of the Supreme Court at October Term, 1932; 47 H.L.R. 245, 260 (1933)

Stern & Gressman, Supreme Court Practice, pp. 214, 215 (1950)

The question as to the constitutionality of the Sunday Closing Laws of three states was at one time decided by this Court in four cases just last year (1961).

McGowan v. Maryland,
366 U.S. 420, 6 L. Ed. 2d 393, 81 S.Ct. 1101 (Md.)

Gallagher v. Crown Kosher Super Market,
366 U.S. 617, 6 L. Ed. 2d 536, 81 S.Ct. 1122 (Mass.)

Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 6 L. Ed. 2d 551, 81 S.Ct. 1135 (Penn.)

Braunfeld v. Brown,
366 U.S. 599, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (Penn.)

The only material difference between the laws of these states and that of Kentucky, insofar as a constitu-

tutional question is involved, is that the Kentucky law exempts,

> "Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday. . . . " [KRS 436.160(2)]

Like the laws of Maryland, Massachusetts and Pennsylvania, Kentucky's law provides a penalty for,

> "Any person who works on Sunday . . . or employs any other person . . . . " [KRS 436.160(1)]

The Kentucky statute excepts from its operation "ordinary household duties, work of necessity or charity" [KRS 436.160(1)] and "amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera" [KRS 436.160(3)].

The Kentucky law has been upheld by the Kentucky Court of Appeals in a long line of decisions, the last of which is the case at bar.

The Commonwealth v. The Louisville and Nashville Railroad Co., 80 Ky. 291 (1882)

Capital Theater Co. v. Commonwealth, 178 Ky. 780, 199 S.W. 1076 (1918)

Strand Amusement Co. v. Commonwealth, 241 Ky. 18, 43 S.W. 2d 321 (1931)

Commonwealth v. Phoenix Amusement Co., Inc., 241 Ky. 678, 44 S.W. 2d 830 (1931)

City of Harlan v. Scott, et al., 230 Ky. 585, 162 S.W. 2d 8 (1942)

Commonwealth v. Arlan's Dept. Store of Louisville, et al., Ky., 357 S.W. 2d 708 (1962)

And as said in McGowan v. Maryland, supra, 366 U.S. at pp. 510, 511, in the concurring opinion of Justices Frankfurter and Harlan:

> . . . But this does not mean that we are to be indifferent to the unanimous opinion of seven

> tions of judges who, in the conscientious discharge of obligations as solemn as our own, have sustained the Sunday laws as not inspired by religious purpose. * * * "

There is nothing in the majority opinions of the McGowan, Gallagher, Two Guys or Braunfeld cases, supra, that indicates a Sunday statute which by its toleration does not penalize a Sabbatarian by requiring him to close on Sunday is unconstitutional. Those opinions, on the contrary, are all consistent with the constitutionality of the Kentucky statute and we therefore cite them as dispositive of the question here involved.

After noting that twenty-one of thirty-four jurisdictions make an exception in favor of those who observe some other day, the concurring opinion of Justices Frankfurter and Harlan in the McGowan case says (366 U.S. at p. 520):

> "However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it."

Other language therein similarly indicates acceptance of such an alternative.

And Mr. Justice Brennan (with whose dissent Mr. Justice Stewart agrees "substantially") indicates that the failure to provide an exception is fatal. Thus, in the Braunfeld case (366 U.S. at p. 611), he makes the following statement:

> "* * * It is the mere convenience of having every one rest on the same day. It is to defend this interest that the Court holds that a *State need not follow the alternative route of granting an exception for those who in good faith observe a day of rest other than Sunday.*" (Emphasis added.)

[1] See 366 U.S. pp. 518, 515, 517.

This reference to religion, excepting Sabbatarians, by its toleration, contains no more religious reference in substance or background than did the laws of Massachusetts or Pennsylvania and not as much as did that of Maryland.[4]

CONCLUSION

We submit therefore that this Court by its decisions in the McGowan, Gallagher, Two Guys and Braunfeld cases, supra, heretofore has decided the constitutionality of the equivalent of Kentucky's Sunday Closing Law and that appellants' appeal should be dismissed because it thereby does not present a substantial federal question.

Respectfully submitted,

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[4] Gallagher v. Crown Kosher Super Market, 366 U.S. at p. 624 [illegible] p. 625 n. 29.

[5] Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 594.

[6] McGowan v. Maryland, 366 U.S. 420 at p. 445.

PROOF OF SERVICE

I, Holland N. McTyeire, one of the attorneys for Commonwealth of Kentucky, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of November, 1962, I served copies of the foregoing Motion to Dismiss and Brief on the appellants herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows: To James E. Thornberry, Esq., 1011 Kentucky Home Life Building, Louisville 2, Kentucky, attorney for Arlan's Department Store of Louisville, Inc.; to Edward M. Post, Esq., Louisville Trust Building, Louisville 2, Kentucky, attorney for Evans Furniture Company.

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Office Supreme Court, U.S.
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versus

COMMONWEALTH OF KENTUCKY . . Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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No. 503

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY — *Appellants*

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ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

The 1961 "Sunday Closing law" cases[1] decided by this Court are relied upon by appellees as authority for a summary dismissal of this case. In those cases this Court subjected the laws in question to a close and painstaking scrutiny in terms of their exact language, history and operative effect and considered related laws, pertinent judicial statements of purpose and

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1. *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101; *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 6 L. Ed. 2d 536, 81 S.Ct. 1122; *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 6 L.Ed. 2d 551, 81 S.Ct. 1135; *Braunfeld* v. *Brown*, 366 U.S. 599, 6 L.Ed. 2d 563, 81 S.Ct. 1144.

other evidence of legislative intent, and then, and only then, did this Court conclude that the laws were secular and not religious in purpose. Certainly these appellants and the people of Kentucky are entitled to nothing less.

This Court did not say by the 1961 cases that the question of separation of church and state is no longer important or that all Sunday legislation is henceforth valid. It was expressly stated in the opinions that they were not to be so construed.

If the Kentucky law is to be subjected to the same standards as were prescribed in the 1961 cases, then the question of its constitutionality can only be determined after the same exhaustive examination of its history and language as was made in the 1961 cases. Obviously, a cursory perusal can lead only to superficial conclusions. It is impossible to present all the data that must be considered in making a proper determination of the issue in preliminary motions and a jurisdictional statement and it is respectfully suggested that this Court cannot fairly dispose of the issue without the benefit of such matter.

Appellants note that appellee places much weight on the "long line of decisions" upholding this law upon

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McGowan v. Maryland, 366 U.S. at p. 453:

"We do not hold that Sunday legislation may not be a violation of the 'Establishment' clause if it can be demonstrated that its purpose evidenced either on the face of the legislation, in conjunction with its legislative history, or its operative effect—is to use the state's coercive power to aid religion."

Also see footnote 101 to Justice Frankfurter's concurring opinion, 366 U.S. at p. 512:

"This does not, of course, imply an opinion of the legitimacy of all the Sunday provisions of all the States."

secular grounds. It is submitted that appellee or this Court may also give weight to *Ray* v. *Catlett & Buck*, 51 Ky. 532, 12 B. Mon. 532, in which the Kentucky Court of Appeals considered the "Kentucky Sunday Closing Law" in substantially the same form as it is now, and in which the Kentucky Court of Appeals stated (51 Ky. at p. 534):

> "One object of the statute was to secure the observance of that decorum and quiet which in a Christian country, is due to the Christian Sabbath. . . ."

And at page 536 said further:

> "And we are satisfied that the particular clause now in question had no other object in view but that of enforcing decorum and quiet on a day regarded as holy by a large part of the community . . ."

In the cited opinion a secondary object of the law was mentioned as being to secure for laborers one day of rest in seven, but this does not alter the fact that this judicial statement of purpose by the Kentucky Court of Appeals places primary emphasis on "the observance of that decorum . . . due to the Christian Sabbath." The Kentucky statute is in substantially the identical form now as it was when the case of *Ray* v. *Catlett & Buck* was decided. The only significant change is the exceptions for amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations and opera.

These exceptions do not evidence a change in the stated objective of the law. Rather they represent a

change in the legislative mind as to acceptable conduct not inconsistent with the decorum due to the Christian Sabbath. While it is true that some of the Kentucky opinions cited by appellees set forth a secular basis for the law's legitimacy yet this cannot alter what was in the legislative mind when the law was enacted. Is the issue before this Court whether other grounds *can be found* to sustain the statute or is this Court concerned with the purpose and intent of the law? A careful reading of the Kentucky cases cited by appellees will clearly indicate that the case at bar represents the first case in Kentucky where the validity of the law on federal constitutional grounds was ever challenged. All pronouncements of constitutionality heretofore made have been dicta. It is of great interest that the Kentucky Court of Appeals should have read the 1961 cases and remained silent as to the purpose of the Kentucky law. The Court of Appeals did not even refer to any of the Kentucky cases cited by appellees.

Instead the Kentucky Court of Appeals disposed of the appellants' contention that the statute is religious in purpose by saying (*Com. v. Arlan's Dept. Store of Louisville, et al.*, Ky. 357 S.W. 2d 709, 710):

> "... the above listed cases [but] not the Court cases ... completely refute the contentions that our Kentucky Statute violates constitutional guarantees and prohibitions with respect to religion. ..."

Does not appellee engage in a tautology of the first order? Appellee tells this Court that it should reject appellants' contention that the law is religious

in purpose. Appellee reminds this Court of its consideration in the 1961 cases of judicial statements by state judges in sustaining the validity of the state statutes and then cites the case at bar where the Court of Appeals relied on this Court to refute appellants' contention. In other words, so the argument goes, the Supreme Court should hold that the Kentucky law is not religious in purpose because the Kentucky Court of Appeals held it wasn't and the Kentucky Court of Appeals held it wasn't because the Supreme Court said it wasn't.

Where in this verbal merry-go-round is "the close scrutiny demanded . . . . when First Amendment liberties are at issue."

Appellees wonder if the prohibition in the Kentucky law against work or labor for *amusement* as well as profit can be rationalized with the holdings of the 1961 cases wherein so much emphasis was placed on the tone of the day as being one of recreation and relaxation.[3] The ban is not only against commercial activity, it is against virtually all activity.

Are not the specific prohibitions against billiards, hunting, boxing and wrestling more consistent with the concept of Sabbath observance than with Sunday rest and recreation?[4]

Appellee states that the exceptions for Sabbatarians is merely an act of tolerance and this should not be

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3. *McGowan v. Maryland*, 366 U.S. at p. 448.
4. *McGowan v. Maryland*, 366 U.S. at p. 447.
Gallagher v. Crown Kosher Super Market, 366 U.S. at p. 622.
Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. at p. 595.

said to impart religious connotations to the statute. What need is there for religious tolerance in a statute the purpose of which is not to use the state's coercive power to aid religion? There is none. If the statute be secular in purpose and effect this Court has said there is no reason for anyone to be exempted from its operation because of his religion.[5] If the statute is not a Sabbath observance statute, why should the exemption apply only to those observing another day as the Sabbath? Uniformity of a general rest day for the community which in the 1961 cases was found to be a legitimate goal was not deemed necessary by the legislature of Kentucky. Otherwise there would be no exceptions for minority religions. There is, therefore, no reason for not exempting anyone who rests on a day other than Sunday unless the purpose of the statute is to insure Sabbath observance rather than one day of rest in seven. If the statute is religious in purpose and effect, then its tolerance however admirable does not save it from the proscription embodied in the constitution.

The Kentucky statute does not proclaim rest and relaxation for the community. Rather it proclaims that the Christian Sabbath shall be observed with decorum and respect by all except those who observe another Sabbath. If, by reason of this statute, secular benefits flow to the community, they are incidental to the legislative purpose. If merely from a finding that collateral secular benefits inure to the community

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5 *Braunfeld v. Brown*, 366 U.S. at p. 607.

a religious statute can be upheld, then the concept of separation of church and state has lost its meaning.

Appellee is silent with respect to the appellants' contention in their jurisdictional statement that regardless of whether the statute is religious or not, the exemption denies them equal protection of law by giving members of certain religious societies preferments denied to these appellants and to others who cannot or will not be members of any religious society. On what secular ground can this distinction be justified? On what rational ground can such discrimination be sustained?

Respectfully submitted.

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Attorney for Appellant, Evans Furniture Company

PROOF OF SERVICE

I, James E. Thornberry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on or before November 26, 1962, I served copies of the foregoing Appellants' Brief Opposing Appellees' Motion to Dismiss on the appellee herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows: To John B. Breckinridge, Attorney General, State Capitol Building, Frankfort, Kentucky, and to Holland N. McTyeire, Assistant Attorney General, State Capitol Building, Frankfort, Kentucky. I further certify a copy hereof has been mailed to Charles E. Keller, 504 Marion E. Taylor Building, Louisville 2, Kentucky.

James E. Thornberry
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Louisville 2, Kentucky